GOVERNMENT

COMMISSIONS OF INQUIRY

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ADVOCATE.

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Has the Crown the right to issue commissions for the purpose of obtaining information only?
And if so, within what limits?

These are two questions which cannot have failed to have presented themselves of late to the minds of many. When the exercise of authority is in the hands of those who are using it for the general good, it is not easy to induce the public to be very critical as to its limits; but when the power of the state is evidently being employed oppressively and for personal and private ends, it becomes necessary, as well as interesting, to inquire what those limits are, and to see that they are not wantonly over-stepped.

Such a moment is the present, for it would be useless to deny the existence of a well-founded belief that the recent appointments of commissions have been made solely with the view of unearthing pretexts for the vacating of offices, in the interests of the administration, and of its friends—ambitious of the spoils of power. Taking advantage of the attention occasioned by the circumstances giving rise to this belief, I propose to examine, and shall endeavour to answer, these two questions.

If such a right exists, it must be either by the common law or by statute.

At first sight it seems hardly to suffer any question that the Crown should have, at common law, the same power to obtain information as to all matters of public interest by com-

mission, that the other two branches of the Legislature undoubtedly have by committee. This power in the two Houses of Parliament is founded on the very necessities of their existence; and it is difficult to imagine any inconvenience or impropriety which should arise from the Crown possessing a similar authority, without which it would seem to be impossible for any administration to carry on intelligently the affairs of the country. There must be, or at all events there may at any time arise, matters on which it is necessary for the Government to possess information, and which cannot be provided for by statute; and to forbid the Government to make such inquiry by commission, would be very much like condemning it to a state of helpless ignorance.

Nevertheless this right has been denied, and on a *dictum* of Lord Coke, mutilated and misinterpreted as I contend, the universities of Oxford and Cambridge* questioned the legality of a commission for inquiry into and reporting upon the state, discipline, studies and revenues, &c., of these universities. Now, without attempting to decide whether the universities are liable to such an inquiry or not (and they may very well be exempt from it without seeking protection from the authority of Lord Coke), I think they have totally failed to make out the position they assume, that "all commissions for inquiry only" (i. e. for obtaining information) "not authorized by statute, are void."

But although admitting to the fullest extent the right of the Crown to appoint commissions of inquiry, it would seem that this power must be so exercised as not to trespass on the rights of individuals, or to enter upon any investigation otherwise provided for by law. The power must be exercised in good faith for the purposes of obtaining information, and not with a view of dividing the responsibility of the executive

* I have taken the facts of this case from the London Law Review, vol. 15.

with persons independent of the direct censure of Parliament. But so understood, this power is a common law right of the Crown, and perfectly independent of the 13th chapter of the Consolidated Statutes of Canada.

That act may be taken as an exposition of the scope of this common law right, when it enumerates * the causes for which commissions of inquiry may be appointed, with power to examine witnesses under *oath;* but it certainly did not originate the right, which, the counsel for the universities admitted, without hesitation, had been frequently exercised. The only effect then of that statute was to give the Governor power to appoint Commissioners, having power to send for persons and papers, to examine witnesses under oath, and to compel them to attend and give evidence. This right of examining under oath, it is hardly necessary to add, the Crown did not possess at common law, more than a committee of the Lords or Commons.

The true doctrine, therefore, appears to be: 1st, that at common law the Crown has the right to appoint commissioners to inquire into, and concerning any matter connected with the good government of the state, or the conduct of any part of the public business thereof, or the administration of justice therein, when such inquiry is not regulated by any special law.

2nd. That here the Governor has the further power, under the 13th chapter of the Consolidated Statutes of Canada, to authorize the commissioners so appointed in any of the above mentioned cases, to summon before them "any party or witnessess, and of requiring them to give evidence on oath

* Whenever the Governor in Counsel deems it expedient to cause inquiry to be made into and concerning any matter connected with the good government of this province, or the conduct of any part of the public business thereof, or the administration of justice therein, and such inquiry is not regulated by any special law, &c.

orally, or in writing, and to produce such documents and things, as such Commissioners deem requisite to the full investigation of the matters into which they are appointed to examine."*

If this exposition of doctrine be correct, it would seem to result, 3dly, that neither by common law, nor by the general statute, does any such power extend to the investigation into anything purely of a private nature, or into the conduct of any person named, or to any accusation of any crimes or offences alleged against any particular person.

Fortunately we are not obliged to have recourse to abstract reasoning in support of this proposition. In the 12 Coke 31, under the heading of Trin. 5 Jac. 1, we find the following: "Note; commissioners in *English* under the Great Seal directed to divers commissioners within the counties of *Bedford*, *Bucks*, *Huntington*, *Northampton*, *Leicester*, and *Warwick* to enquire of divers articles annexed to it:† and the articles were also in *English*, to enquire of depopulation

* And for carrying out these powers the Commissioners have "the same power to enforce the attendance of such witnesses and to compel them to give evidence as is vested in any Court of Law, in civil matters." Sect. 1, S.S. 2.

† The articles annexed (which I have copied from the Law Review mentioned above,) were instructions to the Commissioners to inquire:—

1. Of towns, villages, churches, houses, farms, &c., wasted or depopulated since 20 Eliz., and the persons in default.

2. Of lands converted from tillage to pasture by unlawful enclosure, and by whom.

3. Of lands severed from farmhouses, so as to leave insufficient for the use of the occupants, and by whom.

4. Of barns and outhouses pulled down, decayed or deserted, and by whom.

5. Of those who keep on hand several farms, and let the farmhouses stand void or occupied by the poor.

6. Of farmers removed from their houses by their landlords, and the houses left vacant, and by whom.

7. Of obstruction of highways by unlawful enclosures and by whom, &c."

of houses, converting of arable land into pasture, &c. But the commissioners should not have any power to hear and determine the said offences, but only to enquire of them: and by colour of the said commissions the said commissioners took many presentments in *English*, and did return them into the chancery and after, *scil. Trin.* 5 *Jac.* it was resolved by the two chief Justices, and by *Walmsley*, *Fenner*, *Yelverton*, *Williams*, *Snigg*, *Altham*, and *Foster*, that the said commissions were against the law for three* causes :

1. For this, that they were in English.†

2. For that the offences enquirable were not certain within the commission itself, but in a schedule annexed to it.‡

3. For this, that it was only to enquire, which is against law, for by this a man may be unjustly accused by perjury,§ and he shall not have any remedy.

4. For this, that it is not within the statute of 5 Eliz , &c.

Also the party may be defamed, and shall not have any traverse to it.

Such a commission may be only to enquire of *Treason*, Felony committed, &c. And no such commission ever was seen to enquire only (i. e. of crimes)."

This *dictum* then of Lord Coke fully supports our 3rd proposition. The commissions to the persons in these different counties, were commissions of inquiry only, as to offences, and

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* In the edition of the report before me there are four paragraphs numbered; but the causes are of three kinds.

† No record could be in English before the 4 of Geo. 11 cap. 26.

‡ Curious to say this same irregularity occurs in the clerk of the Peace Commission, and it was a great snare on the hearing of the *quo warranto*, for the Court did not seem to know whether to read the charges as part of the commission or to treat them as a separate matter.

§ Our statute to some extent does away with that difficulty, for it attaches the pains of perjury to all false swearing before Commissioners, i. e. those lawfully appointed.

as to the *persons* " by whom" they were committed, and as Lord Coke says, " no such commission ever was seen." And this *dictum* is confirmed by *Hale* & Hawkins*.†

But commissions for more than inquiry, that is to hear and determine, could not be addressed to commissioners, but to the judges of assize, for in *Magna Charta*, cap. xii., we find, " We, or if we be out of the realm, our Chief Justicer, shall send our Justices through every county once in the year, who, with the knights of the shires, shall take the aforesaid assizes in the counties." And the famous chap. xxix, declares: " No freeman shall be taken or imprisoned, or be disseised of his freehold, or his liberties, or free customs, or be out-lawed, or exiled, or *in any other wise destroyed*, nor will we pass upon him nor condemn him unless by the lawful judgment of his peers, or by the law of the land." And Coke interprets this to mean, " no man shall be condemned at the King's suit, either before the King in his Bench, where the pleas are *coram rege* (and so are the words *nec super eum ibimus* to be understood) nor before any other commissioner or judge whatever (and so are the words *nec super eum mittemus* to be understood.)‡ And so the 16 Car. 1, cap. 10, which abolished the Star Chamber, declares " that from henceforth no Court, council, or place of judicature, shall be erected, ordained, constituted, or appointed within this realm or dominion of Wales, which shall have, use or exercise the same or the like jurisdiction§ as is or hath been

* Special commissions to hear and not to determine offenses: Tho' by force of some particular statutes such commissions of inquiry may issue as upon the statute of 23 H. 6, cap. 10, of sheriffs and some others, *yet regularly as to matters of misdemeanour, especially such as are capital, as felony or treason, no such* inquiry only is warrantable: 2 Hale's P. C. p. 21, fo.

† Book 2, chap. 5, p. 25.

‡ Inst. 46.

§ It was ordained by the 3 Hen. 7, c. 1. and by the 21 Hen. 8, c. 2, that the chancellor assisted by others there named, should have power

used, practised or exercised in the said Court of Star Chamber." And the Bill of Rights establishes that all commissions and Courts, of a like nature to the late Court of Commissioners for ecclesiastical purposes, are "illegal and pernicious"

It is therefore not only the positive law, but the very basis of all that policy, of which British subjects are so justly proud, that no one shall be affected in his liberty, or in his goods, or in his character, but in the regular course of law.

This proposition will be readily admitted. Indeed it would be no easy task to find any one bold enough openly to controvert it; and yet we find the principle it involves flagrantly contravened, without almost attracting a passing remark. As an example we propose, in conclusion, to examine the commission addressed to Messrs. Lafrenaye & Doherty, in the early part of the present year;* and in order that there may be no cavil as to the narrative, I propose to give the substance of the documents.

On the 18th of February, 1863, a Commission was issued setting forth, that "certain charges of *malversation of office* had been made against the late joint Clerk of the Peace and Clerk of the Crown at Montreal, Messrs. Delisle & Brehaut, and their Deputy also, Charles Schiller." The Commission went on to state that it "had been deemed advisable that the *charges* so made should be thoroughly *investigated*, and that full *enquiry* should be made into the organization of those offices;" therefore the Governor, "under and pursuant to the

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to punish routs, riots, forgeries, maintenances, embraceries or perjuries, and other such misdemeanours as were not sufficiently provided for by the common law, and for which the inferior judges were not so proper to give correction. V. Tomlins Dict. Vo. Star-Chamber.

* This Commission is by no means exceptional, except perhaps in the spirit and motive of those by whom, and at whose instigation, it was issued. The commissions against Mr. Archambault and into the Corrigan murder and many others, are in law quite as objectionable as those against Messrs. Delisle & Brehaut, and against Mr. Tassé.

Provisions of the 13th chapter of the Consolidated Statutes of Canada, "nominated, constituted, and appointed" Pierre Richard Lafrenaye and Marcus Doherty, to be Commissioners to *investigate* the *charges* so brought against the above *officers*, and to inquire into the organization of those offices." The Commission further empowered the said Commissioners "to summon before them any party or witnesses, and to require them to give evidence on oath, orally or in writing, and to produce* such documents and things as they, the said Pierre Richard Lafrenaye and Marcus Doherty, may deem requisite to the full investigation of the matters and things aforesaid."

Under this Commission MM. Lafrenaye & Doherty met, and addressed to the parties accused, summonses to appear before them "*to answer* † *and explain such charges* as may then and there, and *from day to day*, during the sitting of said Commissioners, ‡ be preferred against you as such, late joint Clerk of the Peace, and Clerk of the Crown as aforesaid." MM. Delisle and Brehaut and Mr Schiller appeared in obedience to this *fiat*, on the 9th of March, when a list of charges was communicated to them to the following effect :§

"1st. That by false returns, false names, signatures, and false pretences, the late joint Clerk of the Peace and Clerk of the Crown at Montreal, Messrs. Delisle & Brehaut, and their

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*In the words of the statute, but the statute is badly drawn.

† And yet one of the Commissioners had the hardihood to declare, subsequent to the proceedings on the *quo warranto*, that "they did not ask Mr Delisle to bring forward witnesses," and that "They were not a tribunal to decide." Why then was he called upon to *answer*, and how was he to do it but by bringing up evidence ?

‡ If the Commission goes beyond the law ; this summons as far exceeds the Commission, which only authorizes the commissioners to investigate "certain charges," i. e. charges *certain* at the date of the commission.

§ *Query.*—Were those the charges of malversation of office "made" against MM. Delisle and Brehaut and Schiller, or is it a schedule drawn up by the Commissioners on their authority. The question might be important even though the Commission were legal.

Deputy also, Charles E. Schiller,* have fraudulently obtained a considerable amount of money from the government.

2nd. That one of them has embezzled *some* of the Government moneys.†

3rd. That large frauds have been carried on in the way of postage.

4th. That some of the government stationery in their office has been sold to a second party.‡

5th. That some unclaimed stolen goods have been taken, carried away and unlawfully appropriated to the use of one of those officers, the Deputy.

6th. That a quantity of stationery belonging to the Government, such as blank books, paper, ink, &c., was used for the schooling and education of children.

7th. That they speculated on Government moneys by drawing a sum of £125 a year allowed for a clerk, and paying that clerk only £60 a year, and pocketing the balance.

8th. That Charles E. Schiller, in his capacity of Superintendent of Crown witnesses, has for many years past falsely and fraudulently obtained large sums of money from Gov-

* The Commission says Charles Schiller; but now a days identity is looked upon as a trifle.

† Which of them, or how much money, is an unimportant detail.

‡ Did it never strike the authors of this Commission to ask who the mysterious second party was, or did they purposely conceal their information? In the ordinary criminal courts they are more ingenuous; the accused are given communication of, and are allowed to take copies of all the affidavits of circumstances. What would be thought of arresting a man for larceny without telling him to whom the article said to be stolen belonged? Warren Hastings was accused of having been "guilty of a high offence, contrary to the fundamental principles of justice, in the said mode of charging misdemeanors without any specification of *person*, or *place*, or *time*, or *act*, or *any offer of specification of proofs, by which the party charged may be enabled to refute the same, in order to unjustly load his reputation, and to prejudice him with regard to the articles more clearly specified.*"

ernment by overcharging the actual costs of the services of subpœnas.

9th. That the said Charles E. Schiller, every time he swore to the correctness of his accounts, committed perjury.

10th. That the said Charles E. Schiller has, at the very least, defrauded Government of £125 to £150 a year for many years past.

11th. That the said Charles E. Schiller has been in the habit of making a profit upon the fees charged by constables for the services of documents emanating from the office.

12th. That the said Charles E. Schiller has also been accustomed to take credit for the payment of mileage upon the service of subpœnas when such subpœnas had been sent by post, and no mileage had occurred."*

Now if we apply the *dictum* of Lord Coke, and the other judges, and the principles involved in the statutes and authorities cited, is it not perfectly plain that this Commission is "illegal?" It is specially and particularly a commission to investigate crimes and offences alleged to have been committed, and so were the commissions † set aside by Coke and his brother judges.

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* These articles of accusation are signed "P. R. Lafrenaye, Com." "M. Doherty, Com." It would therefore appear that they are the authors of the accusations. Will it be pretended that their commissions authorized them to accuse as well as to hear evidence? On the trial of the *quo warranto*, Mr. Laflamme admitted they did not; but added, "they (the Commissioners) did no more than hear evidence. Mr. Doherty said they were "neither prosecutors nor persecutors." Is the statement of fact correct? I doubt it.

† The matters to be inquired of by these commissions were called *offences*, *vide supra*, p. 7, and no commission was ever seen to inquire only of crimes, *vide supra*, p. 7. The writer too of the article in the Law Review quoted above, also says:—"It is plain, therefore, that the offences enumerated in the articles attached to the above Commissions of Inquiry were surmised to be of an indictable quality, either at common law, or under some act, and that the Commissions themselves were de-

But it has been attempted to argue that the Crown has at all events a right to make such an inquiry into the conduct of its own servants. On the hearing of the merits of the *quo warranto*,* both the counsel for the Crown argued so. Mr. Laflamme said: "They (the accused) were *public servants*, and the Government had acted the part of a master, who, when he hears that his servant has made away with some of his property, calls him and inquires of him whether such is the case or not." And Mr. Stuart said: "It (the Commission) issued as from a *master* to his *servant*."

The comparison is most unfortunate, as no analogy exists between the two cases. In the first place, masters do not issue commissions to hold courts of inquiry to investigate whether their servants have made away with their property; and, in the second place, a commissioned officer of the Crown, or, as Mr. Laflamme calls him, "a public servant," is not at all in the position of a private servant. The latter retains his employment according to the terms of his agreement; but the former has a tenure of office equal to a freehold, and from which he cannot, or at least ought not, to be dispossessed without just cause. To establish such just cause, a commission like that addressed to MM. Lafrenaye and Doherty would be useless, for a reason which Mr. Monk put very well at the argument in a question to Counsel. He said: "Suppose these gentlemen were tried before the ordinary tribunals for perjury, forgery, larceny, and embezzlement, and acquitted,

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signed to put the Crown in possession of the authentic presentment of a jury, made upon oath with all the form of a Court of Oyer and Terminer, or other court of criminal jurisdiction."

* A writ of *quo warranto* was sued out by Mr. Schiller; but I have avoided any special examination of that proceeding, as it does not appear to assist one in arriving at any conclusion as to the principles involved in the present inquiry. At most the judgment declares the form of the commission under consideration legal and conformable to the Statute; but I hardly think it will ever have weight as a leading case.

the government could not afterwards find them guilty, and dismiss them. Suppose again, that the commission considered them guilty, and the government said all they had to do was to dismiss them, it would be impossible for them to do so, till they had been disposed of by the ordinary tribunals. This view of the case presents a serious difficulty." And it appears to me to be a difficulty which has not been overcome, and cannot be, unless we are to admit that in accepting office under the Crown one loses the rights of a British subject, a principle which I am not disposed to admit on the simple *dicta* of the two Queen's Counsel.

But Mr. Laflamme contends that the Crown used the lesser having the greater power,—he remembered the *brocard* "*qui peut le plus, peut le moins.*" He says "The government in fact, had power to discharge these public officers without assigning any cause ; but instead of this rigorous proceeding they issued a commission, &c." Even the use of the word *Government* hardly reconciles one to so arbitrary a doctrine from the mouth of a democrat of so long standing as Mr. Laflamme. The Government has, in fact, the *power* to discharge, just as a jury has the power to decide, on the law. They have legally the *power ;* but they have not constitutionally the *right.* Our constitution has no irresponsible powers ; and the responsibility of the executive, in matters of office, is to Parliament. But this direct responsibility is exactly what, it is supposed, the present administration seeks to avoid by the appointment of such commissions* as the one now under investigation, and others equally reprehensible.

Another argument, but little less untenable than the last, has been used in favor of the Commission. It has been said that the Commission is not wholly bad ; that it is at all events

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* The finance commission is doubtless bad under the 13th chapter of the Consolidated Statutes of Canada, because "such inquiry" is fully regulated by "special laws."

good, in so far as regards the inquiry into the organization of the Crown and Peace Offices;* but this pretension will hardly bear a moment's consideration. A commission is to do a certain thing or certain things, and it is not competent for the Commissioners to do a part and leave part undone. An omission to do, might in practice amount to doing that which the Commission in no way authorized. Besides, were not the Commissioners sworn?† In addition to this, there is an objection to the partial execution of a commission under the statute,‡ namely, that the witness is sworn to tell the whole truth, under the authority of the Commission, and it would be impossible for him to divide the legal from the illegal part; and the Commissioners have no power to administer to a witness an oath to give evidence as to so much of the inquiry as they, the Commissioners, consider legal.

If, however, any doubt could exist as to the illegality of this Commission, it must necessarily be destroyed by the attitude of the Commissioners, on the refusal of Mr. Justice Aylwin to be sworn. If they were acting under the authority of a commission which authorized their proceedings, it was not only their right, but their duty to compel the witness to give evidence.§ When Mr. Delisle asked for compulsory process, one of the Commissioners is reported to have said that they "could not compel the witness to give evidence;§ but next day the same Commissioner shifted his ground, and tried to soften the bluntness of the previously expressed opinion. The excuse then was, that there was no subpœna. But the witness was there, and to their face refused to be sworn, or

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* It would seem from the report of the judgment on the *quo warranto*, that the Court suffered from some such impression.

† If so, the oath would be to perform faithfully the whole duties of the office, and not a part of them.

‡ Cap. 13, C. Sts. C.

§ *Vide supra* note on page 6. Also the terms of the Commission.

in any way to give evidence! Yet the Commissioners affected not to proceed because there was no affidavit of circumstances of a direct contempt! and no subpœna!!

The other Commissioner also declared that he wished it to be distinctly understood that they never gave a form of any kind, *or consented that such should be used.* Now *I have seen* a subpœna *signed by both Commissioners*, in the following form, *the words in italics being* struck out by hand, when issued for the defence, or rather, I should say, to keep up the distinction the Commissioners are *now* so eager to establish, the witnesses called at the suggestion of one of the accused:

PROVINCE OF CANADA, }
District of Montreal. }

BY VIRTUE of a Commission of His Excellency The Right Honorable Charles Stanley Viscount Monck, Baron Monck of Ballytrammon in the County of Wexford, Governor-General of British North America, and Captain-General and Governor-in-Chief in and over the Provinces of Canada, Nova Scotia, New Brunswick, and the Island of Prince Edward, and Vice-Admiral of the same, &c., &c., &c.

Appointing Pierre Richard Lafrenaye and Marcus Doherty, Esquires, Commissioners to investigate certain charges of Malversation of Office, which have been made against the late Joint Clerk of the Peace, and Clerk of the Crown at Montreal, Messieurs Delisle and Brehaut, and their Deputy also, Charles Schiller, and to enquire into the organization of those offices.

To

of the City of Montreal,

You and each of YOU are hereby summoned and required *in Her MAJESTY'S name*, personally to be and appear before us, the said Commissioners, on the day of at the hour of o'clock, in the noon, in the Special Jury Room, in the Court House in the City of Montreal, then and there to give EVIDENCE touching the matters referred to in the said Commission, *and herein neither you nor either of you are to fail at your peril.*

Given under our hands, at the City of Montreal, this day of ... in the year of Our Lord one thousand eight hundred and sixty-three.

Commissioner.

Commissioner.

I, the undersigned Bailiff, do hereby certify and return, under my oath of office, that on the day of I did serve in the within named a duplicate of this *Subpœna* by speaking to and leaving the same with

Dated at Montreal, this day of 1862.

A trick of a similar nature was attempted after the decision of the *quo warranto*, when the form of summons was changed to a mere notification, dated 30th August; that the Commissioners "would resume and proceed with such investigation and inquiry upon such charges *as form the proper* † *matter of the inquiry and investigation* to be made, by and in virtue of the Commission issued by His Excellency, bearing date the 18th of February, 1863, for that purpose.‡

Is it possible to avoid the conclusion that the Commissioners were persuaded of the utter illegality of their acts?

A feeble attempt has been made in one of the daily papers to question the propriety of Mr. Justice Aylwin's conduct in going before the Commissioners and refusing to be sworn. To non-professional persons this may appear to have some weight, but his doing so was perfectly in accordance with the practice in such matters. Where there is a semblance of authority, the proper way is to inquire if it is real or usurped, and this is what Mr. Justice Aylwin did. But the Commissioners and their friends are indignant that he did not treat them and their proceedings with the contempt which, no one is more fully convinced than the Commissioners themselves, they so richly deserved.

It may be that a virtuous Executive will pay no attention to all these irregularities, in so far as regards this particular

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* *Vide supra*, p. 10.

† What purpose?

Commission ; but it is probable that we have seen the last of commissions to inquire of felonies and misdemeanours for some time to come. If another makes its appearance, it is to be hoped it will be met with a resistance of a formidable description.